NO. 22,743

UNITED STATES

COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE EDWIN ALLEN PARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Judgment of the United States

District Court for the District of Oregon

BRIEF FOR THE APPELLEE

SIDNEY I. LEZAK
United States Attorney
District of Oregon

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NOTE

The Court's copies of all transcripts of pre-trial proceedings were re-numbered by the Court Reporter prior to forwarding them to the Court. Unfortunately, he did not advise us that he was doing so and we were unable to obtain copies from the Court. Our references to pre-trial transcripts will therefore be dependent upon the numbering system of our transcripts which we will submit to the Court at the time of argument, or sooner if the Court desires.

In our Brief we will refer to the Clerk's Record as (R), to the Trial transcript as (TR) and to the pre-trial transcripts as (TR) with the specific date and our page number.

Unfortunately defendant does not appear to distinguish between the Clerk's transcript, the pre-trial transcript and the trial transcript in every instance.

STATEMENT OF THE CASE

Defendant has made no statement from which the Court could glean an understanding of the case.

Defendant was convicted by a jury on all counts of a three-count indictment. The first count charged defendant with unlawful possession of a counterfeit $10.00 Federal Reserve Note in violation of 18 U.S.C. § 472. The second count makes the same charge with respect to a $5.00 note. The third count charges defendant with unlawful possession of a plate from which an obligation of the United States is printed in violation of 18 U.S.C. § 474.

In May 1965, about one month after one Charles Slaney purchased a 1250-type multilith press (Gov.Ex. 16), the defendant had some conversations with him about whether Slaney could make a duplicate of some Canadian currency (Tr. 100-1). Slaney had no technical knowledge and defendant took the press in approximately October 1965 with the aid of a man called Lino or Linus (Tr. 103). Slaney also gave Parker some blank plates, paper and some green inks and received $250 from Parker for the use of the press (Tr. 104).

Slaney had purchased some green inks which Parker had described and asked him to get and in January 1966 he furnished additional ink for Parker (Tr. 107).

Parker, in January 1966, had brought a box containing credit cards, Oregon and Washington titles and some plates to Slaney's house, which bore impressions of $10, $20 and $50 bills (Tr. 105-108).

In January 1966, Parker returned the press to Slaney's residence at 2706 S.E. Ash Street, Portland, Oregon, where it remained (Tr. 108-109).

In March or April of 1966, Slaney saw the box containing plates which Parker had left with him in Parker's living room (Tr. 110).

On August 17, 1966, defendant's 16-year-old daughter, Sandra Parker, was residing with him at 11945 S.E. Merrill Drive in Portland (Tr. 199). She was cleaning the house and when she moved a footlocker (Gov. Ex. 2) to clean under it she found a sack of uncut counterfeit $5 bills.(Tr. 200). Later that day she looked in the footlocker and found two boxes of counterfeit money (Gov. Ex. 2c & 2d) (Tr. 202-3). She then called her mother, Wilma Niver, defendant's former wife, and took one of the uncut counterfeit $5 bills to Mrs. Niver that night (Tr. 204). [That bill is Gov. Ex. 1.] She asked her father about the footlocker that night, and he told her that was his "gold" and that she should stay out of it (Tr. 205). Mrs. Niver and Sandra gave the note to Special Agent John Wells the following day, August 18, 1966, (Tr. 233).

Based upon the information obtained from Sandra Parker and on the counterfeit bill which was given to him, Wells obtained a search warrant on the following day from Commissioner Clare Mundorff (Tr. 242).

A search was thereafter made of the defendant's residence resulting in the finding of the counterfeit bills in the footlocker (Tr. 243-249) and printing plates bearing impressions of counterfeit bills (Tr. 250) (Gov. Ex. 2a).

After finding the materials in the footlocker, Secret Service Agent Frank Kenney searched the defendant and found three counterfeit bills, two tens and a five, in defendant's wallet set apart from the genuine currency also contained therein (Tr. 452).

One of those $10 bills is Gov. Ex. 7 which is the bill for possession of which defendant is charged in Count I of the Indictment.

Gov. Ex. 8 is a counterfeit $5 bill taken from the footlocker in defendant's residence and that is the bill for which defendant is charged in Count II of the Indictment (Tr. 256).

Gov. Ex. 9, found in the footlocker, is an offset metal plate, the possession of which was charged in Count III of the Indictment (Tr. 266).

On the next day Special Agent Wells obtained a search warrant for the Slaney residence and found the printing press, supplies and counterfeit $5 notes (Tr. 276).

Mr. Wells testified that Gov. Ex. 13, which is one of the $5 bills found in the Slaney residence is the same as Gov. Ex.1 which Sandra Parker found in Parker's residence.

An expert testified that Ex. 9, the plate, had been used to make Ex. 8 (Tr. 388) on the printing press found in Slaney's basement (Tr. 391).

INTRODUCTION TO ARGUMENT

It is impossible to understand the building of a voluminous record in such a comparatively simple case without some understanding of the defendant, Mr. Parker.

He referred to himself as a "jailhouse lawyer" (Tr. 907) and shortly before this trial was acquitted on a murder charge in which he represented himself after two prior convictions had been set aside. (Tr. 1039-40). It is apparent from the record that the courts and prosecution were taking unusual steps to meet his vociferous objections and complaints at every stage of the proceedings in order to see that his rights were not violated.

The record shows that there were at least thirteen pre-trial hearings covering the various matters to which defendant took exception and for which he has been given transcripts. The Court provided him with three attorneys (Messrs. Peterson, Kowitt, and Epstein) at various stages of the proceedings. He was provided an investigator and an expert witness from government funds.

He and his attorneys were shown all government exhibits long before trial and were given the statements of all witnesses prior to trial. (Tr. 73-74).

The government and the Court went far beyond that which the rule requires.

He was given two continuances and the Court took special precautions to avoid the effect of publicity, for part of which he was responsible. (Tr. Dec. 14, at p. 60)

On January 5, 1967, his bond was reduced to $5,000 and he made bail and was released to actively participate in his own defense, which he did.

A. Warrant of August 19, 1966 for 11945 S.E. Merrill

Part of the confusion engendered by defendant's brief on this point is due to defendant's unwillingness at the start of his discussion of the warrant for 11945 S.E. Merrill Drive to set forth the statement of John E. Wells which appears at page 19 and 20 of the Clerk's record. That statement is incorporated by reference into the form affidavit of search warrant (R. 18) to which Mr. Wells has sworn and reads as follows:

Statement of John E. Wells, Special Agent, U.S. Secret Service

"On August 18, 1966 I interviewed Wilma Niver and her daughter, Sandra Parker, at 9115 N.E. Hoyt Street, Portland, Oregon. They advised me that Mrs. Niver is the former wife of Lee Edwin Allen Parker and Sandra Parker is the daughter of Mrs. Niver and Lee Edwin Allen Parker.

"At that time Mrs. Niver delivered to me a counterfeit $5.00 Federal Reserve Note, Serial No. L58976705C, Check Letter H, Face Plate 151, Back Plate 2120, Series of 1950A. Mrs. Niver advised me that she obtained said counterfeit Federal Reserve Note from her daughter Sandra Parker.

"Sandra Parker stated to me at that time that she had obtained this bill from the residence of her father, Lee Edwin Allen Parker, at 11945 S.E. Merrill Drive, Portland, Oregon, on the afternoon of August 17, 1966, having found it on the floor of said residence underneath a trunk. She further stated that she opened the trunk and observed its contents which consisted of numerous sheets of paper bearing impressions of $1.00, $5.00, $20.00 and $50.00 counterfeit bills.

"Sandra Parker stated that she delivered the bill which she found at 11945 S.E. Merrill Drive to her mother, Mrs. Niver, and that it was the same bill that Mrs. Niver had then delivered to me. I have retained said

bill in my possession.

" I have reason to believe the truth of the information supplied by Sandra Parker for the reason that she furnished other information to me which is known to me to be true, including the statement that one Charles Slaney had resided in the vicinity of S.E. 27th Avenue & Ash Street, Portland, Oregon, and that Slaney was presently serving a term in jail."

It should also be noted that the search warrant for which this affidavit was given is at page 13 of the Clerk's record. The grounds for the affidavit of search warrant are set forth in the statement of Mr. Wells. Defendant seems to contend that because the grounds are not stated at the place provided in the form or in the exact language of rule 41(b) that the affidavit is defective.

In U.S. v. Meeks, 313 F.2d 464 (C.A. 6, 1963) the Court said referring to a situation like this where statements were attached to the official printed form of the affidavit -

> "The real question is, were the attachments fastened to the instruments at the time of their execution so as to constitute one complete document, in which event it would not be necessary that they be separately signed. Clay v. U.S. 246 F.2d 298, 303, C.A. 5th. In the present case the printed form expressly refers to an attachment and the attachment is physically stapled to the form.
>
> Although it was a careless way in which to handle the matter, without better identification and one of which we do not approve, the two papers appear to be one complete document regular on its face, supported the presumption that the Commissioner properly performed her duty. U.S. v. Brooks, supra. Appellant offers nothing to attack the validity of the instruments except the suggestion of the possibility that the Commissioner did not perform her duty. We believe that is insufficient

to invalidate the instruments." 313 F.2d 464, at page 466.

The question therefore is whether, looking to the affidavit as a whole, grounds are stated sufficient to justify its issuance by the Commissioner.

Here the agent not only had the hearsay evidence of defendant's daughter as to the large numbers of counterfeit bills concealed in defendant's home, but he actually had one such bill in his possession which had been given to him. Since a warrant may issue for property "designed or intended for use or which has been used as the means of committing a criminal offense." Rule 416, F.R.C.P. and since this quantity of counterfeit money could be used for no legitimate purpose, there was ample justification for the Commissioner's issuance of the warrant.

This Court must consider the actions of the agents under the standards set by U.S. v. Ventresca, 380 U.S. 102 at page 108.

> ". . . affidavits for search warrants must be tested and interpreted by magistrates and Courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

To require the agents to allege that the counterfeit bills which were stated to be in violation of the law were also being held with "intent to defraud" would be a highly technical requirement without substance.

Unlike those cases cited by defendant in which the Court held the

allegations insufficient to show the illegality of the intended use. counterfeit money is described as being held by Parker in violation of the law. In U.S. v. Petrone, 185 F.2d 334 (C.A. 2, 1950) discussed more fully infra the Court pointed out that there was no honest use for a quantity of counterfeit bills. Intent to defraud can be inferred from possession.

Defendant's next point is that because the Government alleged that Lee Parker "held" the money, only a search of his person was warranted. The Government contends that the meaning given to the word "held" also encompasses "to have in one's keeping" - Webster's Seventh New Collegiate Dictionary (1963).

As to the allegation that the search of Lee Parker's person was unlawful, it would be ridiculous to require that the counterfeit money actually be seen or felt on his person before a search could be authorized.

Counterfeit money, as has been pointed out, is made to be passed and it would be a normal assumption that an adult male on those premises might have some on his person for use.

It should also be noted that even if the warrant was insufficient to search defendant's person he could have legally been searched incidentally to his arrest after the agents discovered the contents of the footlocker, Jones v. U.S., 362 U.S. 257 (1960). That the agents took the conservative approach of procuring a search warrant for the defendant's person is to their credit and in keeping with the spirit of Ventresca.

Another of defendant's contentions is that the reliability of the uniform is not established. This completely ignores the fact that Sandra

Parker had a counterfeit bill with her and was present when her mother gave it to Agent Wells.

The case of U.S. v. Jordan, 216 F. Supp. 310 (1963) is cited by defendant, apparently for the proposition that cash not described in the warrant was illegally seized.

In that case, however, the discovered cash not described in the warrant was bona fide and did not fit the specific description contained in the warrant. There being nothing to connect the specific true bills of different denominations with the warrant or the crime they were properly returned by the Court which approved the balance of the seizure.

Here the $10 bill was a part of the criminal conduct as well as evidence of the crime.

B. Warrant of August 20, 1966 for 2706 S.E. Ash.

The Government makes the same contentions with respect to the warrant of August 20, 1966 as the August 19, 1966 warrant. But in addition the Government contends that the defendant does not have standing to protest the seizure of property which he does not claim to have an interest in at a residence where he does not reside.

In the leading case on the subject, Jones v. U.S., 362 U.S. 257 (1950) the Court said at page 261:

> "In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."

Defendant does not have "standing" to protest the search at the Slaney residence.

ANSWER TO POINT II

Defendant was before the Commissioner at 9:30 P.M. on Friday night, August 19, 1966, (R. 2-3) counsel was appointed for him. The defendant demanded an immediate preliminary hearing and the record shows that Mr. Kenney, Secret Service Agent was ready to proceed but that defendant would not proceed without a court reporter.

There is no showing that a court reporter was available at that late hour and the Commissioner set the preliminary hearing for the following Tuesday, August 23, unless defendant's attorney could arrange for it earlier (R. 2).

Defendant's complaint about the failure to have a warrant seems to assume that one is required by Rule 9, F.R.Cr.P. In fact, Rule 9(a) provides for the issuance of a warrant "upon the request of the attorney for the government." Since the defendant was already in custody prior to the return of the indictment on August 26, 1966, there would be no occasion for the government to request a warrant.

Defendant cites some ancient law in claiming that something more should have been done by the Commissioner in connection with his commitment. The relevance of those cases to the present Federal Rules of Crim. Procedure is not apparent and no showing is made that the requirements of the rules were not met.

Defendant's own description of U.S. v. Klapholz, 230 F.2d 494, shows that it is inapplicable to this case. There is no contention that defendant was not promptly brought before the Commissioner in violation of Rule 5(a).

If Parker was illegally detained, such detention would not have commenced until such time as he was illegally denied a preliminary hearing and since he was brought before the Court on Monday, August 22, and the Court agreed at that time to hold the hearing on the following day, he has no complaint.

ANSWER TO POINT III

Defendant was not misled into believing that Mr. Slaney was not going to be a witness. There was a discussion on June 20, 1967, showing that Mr. Slaney was coming (Tr. 4) and the Court says at Tr. p. 81 after Mr. Peterson claimed surprise, "Well, he was mentioned the other day in our conference in Court Friday that the Government was going to subpoena him." There is also an attempt made to charge the government with misleading defendant by charging that Mr. Lezak led defendant to believe that the material picked up as a result of the second search warrant would not be used (pp. Br. 32).

The explanation for this statement is contained in testimony by Lezak called by defendant as an adverse witness by defendant:

> "Q. I want to ask you, Mr. Lezak, at the preliminary hearing on August 26, 1966, in this courtroom, did you advise this man that the search warrant at the Slaney residence had nothing to do with his case, the case of U.S. vs. Lee Edwin Allen Parker?
>
> "A. I have to explain. The answer is that I used substantially the words you are using, that I used, but what I was saying, Mr. Peterson, was that at that time the search of the Slaney residence had nothing to do--not with the case of U.S. v. Parker, but with the preliminary proceeding or preliminary hearing which was then being heard by the Court. We didn't feel it was necessary to introduce evidence which had been seized at the Slaney residence in order to produce enough evidence for the Court to hold Mr. Parker to the charge. We felt we had plenty." (Tr. 877-8)

Since all of the material seized at Slancy's residence was shown to defendant and contained in the exhibit list, it is clear that defendant was not led into believing that it would not be used.

Efforts were made by the Court right from the start of this case to keep down the publicity which naturally attaches to a man of defendant's propensities and history.

Judge Solomon entered an order prohibiting photographs of the defendant and directed a newspaper reporter not to refer in his article to the finding of counterfeit bills in Parker's possession. (Tr. Aug. 22, p. 15, 18). The only person who gave opinions to a newspaperman was defendant himself.

On December 14, 1966 at a pretrial hearing defendant admitted that he had given an interview to the Oregon Journal alleging a "deal" between the state and federal government whereby he would get 45 years on counterfeiting and the state would drop the murder charge. (Tr. Dec. 14, 1966 pp. 60-63).

On March 27, 1967 defendant filed a motion to dismiss claiming adverse newspaper publicity. (R. 179). To this motion were appended two articles and an editorial. (R. 182-4). The Court in denying that motion stated as follows:

> "Now it is to be observed from the moment of my statement neither one of the papers mentioned the subject which I criticized. Even during the course of the long trial in the state court the matter which I criticized was not mentioned in one press release, except in one of the papers on the last day, when the matter had been submitted to the jury. I understand that on that particular day the defendant here and the defendant there took the witness stand and made a full and complete explanation to the jury of the subject which I had condemned in my statement from the bench. After all, I have no hesitancy in criticizing the press when it is wrong.
>
> On the other hand I have no hesitancy whatsoever in commending it when it does as good a job as was accomplished in the reporting of the murder case. That was objective reporting at its best (Tr. May 1-2, at p. 533-4)."

The last newspaper article about which complaint is made was published in March, 1967 prior to the impaneling of a new jury panel. This is not a Shephard v. Maxwell 384 U.S. 333, U.S. v. Silverthorne 9th Cir. August 27, 1968 case in which there was pervasive publicity just before and during the trial and the Court was careful in its interrogation of the jurors with respect to this matter. (Tr. 25 et seq.)

In the case of Coppedge v. U.S., 272 F.2d 504, there was an article published in the newspaper the day before trial reciting opinions of both the judge and prosecutor with respect to the case.

In the cases of U.S. v. Accardo, 298 F.2d 133, the jury was exposed to newspaper publicity prejudicial to the defendant during the trial itself.

There is simply no analogy between those cases and the present one. It should also be considered that defendant himself brought out the fact of the murder charge in his counsel's opening statement to the jury. (Tr. 547).

In addition it should be noted that defendant was acquitted of the murder charge on the 3rd trial and the publicity may well have been more harmful to the government than to the defendant.

With respect to the suggestions emanating from the Advisory Committee on Fair Trial and Free Press of the American Bar Association, there was nothing shown to the Court in this trial that made it necessary to use this method.

ANSWER TO POINT V

Defendant was released from custody on bail on January 5, 1967, more than six months before the start of the trial. He was represented, as he admits, by " experienced and highly competent trial counsel."

The record demonstrates that he not only asked for more privileges than are given to ordinary prisoners but also that he received them.

But the main point of the government is that there is no showing that anything that was denied defendant affected his rights in any way, even assuming an improper denial.

We do not have before us the exparte showing made by defendant to the Court for witnesses under Rule 17(b) but it should be noted that Parker's defense was simply that of complete denial of any connection with the counterfeit bills and paraphernalia that were found on his person and property.

Defendant does not show how any of the witnesses who did not come would have assisted in overcoming the overwhelming evidence of the guilt of defendant.

Defendant cites the case of Baldy v. U.S., 296 F.2d 882 in support of his contention that he was deprived of his rights by being refused some of the subpoenas which he requested. In that case the discretion of the trial judge was upheld and the Court quoted with approval the folowing statement:

> "It is well settled that Rule 17(b) Federal Rules of Criminal Procedure, 18 U.S.C.A. under which the motion for subpoena was made does not accord the indigent defendant an absolute right to subpoena witnesses at government expense. There is and must be wide discretion vested in the District Court to prevent the abuses often attempted by defendants.

> This Court will not disturb the exercise of the discretion unless exceptional circumstances compel it." 296 F.2d at p. 892.

If counsel's argument as to the failure of the Court to release Parker immediately were to be given any credence it would logically result in reversal for almost any case where the defendant is held in lieu of bail.

ANSWER TO POINT VI

The exception taken to the Court's instructions on Count III by the defendant do not raise the objections raised for the first time on appeal by defendant in point VI. The exception was on the claim that one plate cannot be used to make a counterfeit obligation which is the argument made in defendant's Point VII.

There was no exception taken at the trial to the instruction actually given by the Court with respect to Count III.

Defendant's attacks on the indictment are based upon his failure to consider the fourth paragraph of § 474 under which this charge is brought.

That paragraph reads as follows:

> "Whoever has in his control, custody or possession any plate, stone or other thing from which any such obligation or other security has been printed, with intent to use such plate stone or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security or any part thereof." (Emphasis supplied.)

It is true that the first paragraph of § 474 does not make it a crime to intend to use the plate but that is not what is charged.

Defendant's contention with respect to the use of the word "knowingly" is also incorrect. The indictment does charge defendant with "knowingly" having"in his control, custody or possession" and the word "knowingly" is not used in that part of the statute under which defendant is charged.

There was no exception taken by defendant to the Judge's instructions with respect to the elements of the crime charged in Count III of the indictment.

The reason there were no exceptions is that the Judge's instructions were more favorable to the defendant than should have been given. Judge Kilkenny told the jury that the making of the plate was an element of the crime. Since it is sufficient to convict the defendant for the government to prove that the defendant had unlawful possession of the plate regardless of whether he participated in its making, the defendant got more than he was entitled to and this instruction could not have prejudiced him in any way. The balance of defendant's objections are not intelligible to us and a reading of Judge Kilkenny's instructions show that the jury was adequately instructed on the elements of possession and control and that there could not be any confusion about whether the plate was one which came within the statute.

ANSWER TO POINT VII

Defendant's suggestion that the prohibitions in Title 18, Section 474, United States Code, are limited to unauthorized printings of genuine obligations of the United States can only be described as a non sequitur (Def. Brief, p. 59).

Count III of the indictment charges the defendant with a violation of paragraph 4 of Section 474 which proscribes possession of any plate similar to or in the "similitude of" any plate from which a genuine obligation of the United States has been printed with intent to use or to permit the plate to be used to counterfeit an obligation or security or any part thereof of the United States.

To adopt the otiose construction urged by the defendant would be to completely disregard the common sense and "plain meaning" principles of statutory construction as well as ascribe to the statute a meaning never intended by its framers.

It should not be overlooked that this novel point is now being urged for the first time. Nowhere during the trial or any of its various pre or post proceedings did defendant see fit to raise this point. His failure to do so has waived the same. See points and authorities on this subject in Point VIII, infra, of the Government's brief.

ANSWER TO POINT VIII

Defendant assigns as error the failure to take a multilith printing press, Government Exhibit 16, to the jury room during the jury's deliberations. Initially, it is important to note this exhibit was offered and admitted at the instance of the Government over objection by the defendant. The uncontradicted evidence with respect to this exhibit showed that various plates seized from the defendant's footlocker were or could have been used on this machine and that certain of the notes similarly seized from the defendant and Charles Slaney were made or could have been made from these plates (TR. 263-264, 266-267, 270, 386-393, 398, 403-404, 420; Govt. Ex. 8, 9, 10, 11, 14). It is therefore most apparent that error, if such existed, did not inure to the prejudice of the defendant but rather to the Government. It is also settled that the taking of papers, memoranda, or exhibits to the jury room is a matter within the sound judicial discretion of the court. Murray v. United States, 130 F.2d 442 (D.C. 1942); Miller v. N. Y. Central R. R., 239 F.2d 10, 14 (7th Cir., 1956); Shayne v. United States, 255 F.2d 739, 743 (9th Cir., 1958); C.I.T. Corp. v. United States, 150 F.2d 85, 91 (9th Cir., 1945).

Perhaps even a more important consideration is the size and weight of this exhibit.[1/] Defendant's own witness, Harry Stanley,

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1/ During the pretrial proceedings, defendant's counsel acknowledged the size and weight of the press made it difficult to move. He also considered the possibility that it might not go to the jury should it be received in evidence (TR. 7-8).

former owner of this machine, approximated its weight at close to 700 pounds (TR. 616). Moreover, the jury room was located one floor above the courtroom, and the only entrance to this room was a narrow winding staircase containing some twenty to twenty-five stairs. In the opinion of the seventy-two year old bailiff, no less than five to six people would have been required to transport this exhibit to the jury room (TR. 1032-1033). It should also be noted that the jury made no request to see this exhibit (TR. 1031-1032).

Defendant contends the record is devoid of any evidence suggesting the Court offered the jury the option of using the courtroom (where the press remained) for their deliberations (Def. Brief, p. 62). The record clearly reflects the contrary (TR. 998-999).

It is evident some element of practicality and realism must remain in matters of this sort. The plain truth of the matter is that it was simply not feasible to move this exhibit to the jury room. The reviewing courts are certainly cognizant of the multitude of problems experienced by trial courts in the administration of cases. In Sykes v. United States, 373 F.2d 607, 612 (5th Cir., 1966), the Court stated:

> "'In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure.'"

To the same effect, see United States v. D'Antonio, 362 F.2d 151 (7th Cir., 1966).

Defendant further contends the failure to swear the bailiff and the designation of the Court's law clerk as a "deputy bailiff" for purposes of removing exhibits to the jury room was error (Def. Brief,

p. 61). Defendant carefully neglects to note that neither of his trial counsel took exception in any way to this procedure although they were offered an opportunity to do so and did, in fact, object to certain other matters (TR. 999-1002, 1004). The cases are legion that issues, even if constitutional, not properly raised and preserved in the trial court for review, will not be noticed on appeal. See for example, United States v. Millpax, 313 F.2d 152, 156-157 (7th Cir., 1963), cert. den. 373 U.S. 903; United States v. McCarthy, 297 F.2d 183, 184 (7th Cir., 1961), cert. den. 369 U.S. 850; United States v. Greenberg, 268 F.2d 120, 123-124 (2nd Cir., 1959); Minor v. United States, 375 F.2d 170, 172 (8th Cir., 1967), cert. den. 389 U.S. 882; United States v. Miller, 316 F.2d 81 (6th Cir., 1963), cert. den. 375 U.S. 935; and Hansberry v. United States, 295 F.2d 800, 801 (9th Cir., 1961). See also Meyer v. United States, ___ F.2d ___ (9th Cir., 1968), No. 22,358(A). The only exception to the foregoing proposition is where failure to consider the point on appeal would result in an obvious miscarriage of justice despite defendant's failure to raise the issue in the trial court (R. 52(b), Federal Rules of Criminal Procedure). Not only does the record in the instant case not warrant the invocation of the "plain error" doctrine, but defendant himself makes no such suggestion.

In any event, the question of whether a "permanent oath" can be administered (TR. 999) and the omission to swear the deputy bailiff (TR. 1004) do not warrant reversal absent a showing of prejudice to the defendant as a result thereof. See C.J.S., Vol. 23 A, Criminal Law Sections 1353, 1354. See also United States v. Davis, 103 F. 457,

469 (5th Cir., 1900). It is all too clear defendant has made no such showing nor has there been even the slightest attempt to do so.

ANSWER TO POINT IX

Count III of the indictment charges the defendant with possession of a particular offset printing plate used to produce a certain counterfeit five-dollar Federal Reserve Note. The indictment then describes the note in detail, including the serial number (L68014450C).

During the course of the trial, an offset metal plate found in defendant's residence and bearing the face and back impressions of a five-dollar bill was offered in evidence in support of the charge in Count III (TR. 263-265; Govt. Ex. 9). When an objection was interposed on the ground the plate contained no serial number of any description, the Government was given leave of Court to have the number specified in Count III of the indictment stricken as surplusage (TR. 265-267, 538). Such a procedure is now assigned as error on the theory it was, in fact, an unauthorized amendment of the indictment (Def. Brief, pp. 63-66).

The term "surplusage" is defined as "any fact or circumstance laid in the indictment which is not a necessary ingredient of the offense." Johnson v. Biddle, 12 F.2d 336, 369 (1926). It is well settled that portions of the indictment not affecting its substance may be stricken as surplusage. Johnson v. United States, 207 F.2d 314, 320 (5th Cir., 1953), cert. den. 347 U.S. 938; Williams v. United States, 179 F.2d 656, 659 (5th Cir., 1950), affirmed 341 U.S. 97; United States v. Krepper, 159 F.2d 959, 971 (3rd Cir., 1947), cert. den. 330 U.S. 824. In Soper v. United States, 220 F.2d 158, 161 (9th Cir., 1955), cert. den. 350 U.S. 828, the defendant was charged with assault with a dangerous weapon described in the indictment as

an "M-1" rifle". No evidence was introduced during the trial as to the make of the weapon and the Court instructed the jury that the words "M-1" appearing in each count of the indictment were stricken and should not be considered. Defendant assigned this instruction as error contending it constituted an "amendment" of the indictment. On appeal, the Court found the words deleted nothing more than "non-prejudicial surplusage" and therefore no error was committed by instructing the jury to disregard same. See also the analogous case of Heisler v. United States, 394 F.2d 692 (9th Cir., 1968). Although disapproving amending, correcting, or changing the body of an indictment, no error was found in the trial court permitting the Government to correct the denomination of a counterfeit note which was improperly described in the indictment. Authorizing the Government to make the requested change was held to be "a work of supererogation" and could be "disregarded as harmless since * * * it was void, and * * * the face amount of the note was not an essential element of the offense." Heisler v. United States, supra, at Page 696.

Whether the serial number in Count III of the indictment in the case at bar is determined to be simply surplusage which may be stricken, Heisler v. United States, supra, at Page 696, N. 7, Soper v. United States, supra, or whether the Court's order permitting it to be stricken was "void", the number itself affects neither the substance or validity of the count and thus the error, if any, is harmless. Heisler v. United States, supra; Rule 52(a), Federal Rules of Criminal Procedure.

With respect to the question of variance, an examination of the

record clearly dictates the defendant was fully informed of the charge so as to enable him to prepare both his defense and to be protected against the threat of double jeopardy. Heisler v. United States, supra, at Page 694. As in Heisler, the defendant in the instant case was neither surprised nor prejudiced by the Government's motion to strike the serial number from Count III. An outstanding order of the Court required the Government to "produce everything" (TR. 15). In compliance with this order, the Government furnished the defendant prior to trial with a complete list of all witnesses, save one, their statements, made certain of the witnesses available for interviews, and disclosed and permitted examination of each and every exhibit (TR. 6, 14-15, 81, 90). In view of the complete discovery afforded, it is difficult to imagine how the defendant could have been surprised nor can it be said the variance affected his "substantial rights". It is similarly clear the offense described in Count III is complete irrespective of the serial number.

Defendant further contends it was improper to admit Government's Exhibit 10, an offset plate found in the defendant's residence and containing the serial number described in Count III (Def. Brief, p. 63; TR. 266-267). He theorizes that since the indictment described but one plate and the evidence conclusively showed that no single plate could make one particular note, no other plates with respect to this count could be admitted for any purpose.

Count III of the indictment charges a violation of Title 18, Section 474, United States Code, paragraph 4, which provides that:

> "Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof;" (Emphasis added)

shall be punished.

It is obvious from the foregoing statute that any plate offered by the Government in support of Count III need not be capable of printing an entire counterfeit obligation; the capability to print any part of a counterfeit obligation is sufficient to constitute a violation.

The admission of other plates by the Court, one of which, when coupled with the Count III plate, would produce the entire face of the counterfeit obligation described in Count II, was proper to prove intent, an express requirement of the aforementioned statute. It is axiomatic that in a criminal prosecution any type of evidence should be admitted which is probative in nature and which is neither excluded by a settled rule nor particularly likely to be false, misleading, or unduly prejudicial. Griffin v. United States, 183 F.2d 990 (D.C., 1950); United States v. Matot, 146 F.2d 197 (2nd Cir., 1944). Further the exhibits complained of clearly fall within the ambit of the trial court's wide latitude in determining the relevancy and materiality of evidence which will not be disturbed on review absent an abuse of discretion. Wilson v. United States, 250 F.2d 312 (9th Cir., 1957), reh. den. 254 F.2d 391 (1958). See also United States v. Quarles, 387 F.2d 551 (4th Cir., 1967); Wangrow v. United States, 399 F.2d 106, 115 (8th Cir., 1968); 43 Nebraska Law Review, No. 3, Pages 485, 531.

ANSWER TO POINT X

Defendant has now received a copy of a letter from the Administrative Office of the U.S. Courts, approving the arrangement under which Commissioner Mundorff is serving.

We assume that will eliminate this contention.

ANSWER TO POINT XI

In interrogating the jury on voir dire the Court asked: (TR 88)

> "All right. With the group to the left, is there any one of the jurors who has ever been connected in any way with the laws in connection with a counterfeiting operation or with counterfeit money or securities of any kind?"

This question to which the juror responded was obviously asked for the protection of the defendant. No attempt is made by defendant to show that he was prejudiced in any way by the Court's refusal to seat the juror.

The general rule is that the matter of excusing jurors is left to the sound discretion of the trial judge, the exercise of which will not be interfered with unless it is clearly shown to have been abused to the actual prejudice of the complaining party. 50 C.J.S. 938-9; see Yoho v. U.S., 202 F.2d 241 (C.A. 9, 1953); Bateman v. U.S., 212 F.2d 61, 66 (C.A. 9, 1954).

> "It is well settled that the court may of its own motion reject or discharge from the panel a juror who is disqualified, unfit or incompetent to serve, although he is not challenged or objected to by either party . . . even over a party's objection . . . 50 C.J.S. 1005 et seq."

ANSWER TO POINT XII

On this appeal, for the first time, defendant contends that there is insufficient evidence of "intent to defraud" from the concealment by Parker of the counterfeit money which he possessed.

A case squarely in point is U.S. v. Petrone, 185 F.2.d 334. (C.A. 2,1950).

In that case F.B.I. agents came upon $5100 in counterfeit $10 bills which defendant said was brought in by a "rat."

The Court said at p. 336:

> ". . . Furthermore, once we suppose that Petrone was in possession of the money, his intent to use it fraudulently follows. Such bills have no honest use except when they are in the possession of public authorities as evidence or the like. One might discover that a single bill, or conceivable two or three, had been passed upon one, and perhaps one might keep them without intent to defraud, though even that is doubtful; but nobody in possession of $5100 counterfeit money innocently keeps it; its posesession is to the last degree perilous, and the possessor, if honest, will either destroy it straightaway or turn it over to the authorities."

The government contends that defendant did not intend to use this money to play "monopoly", or for some other innocent pursuit and that the jury was entitled to believe that he kept it with "intent to defraud."

ANSWER TO POINT XIII

The first attorney appointed for Mr. Parker, Edward Epstein, expressed defendant's position on counsel to the Court as follows:

> MR. EPSTEIN: It's my understanding he has no objection to my representing him so long as he is allowed carte blanche to express whatever views he has to the Court or any point which I don't feel to be relevant or material, and take whatever other action that I, for whatever reason, don't feel is warranted.
>
> THE COURT: Does he want to interrogate witnesses:
>
> MR. EPSTEIN: I think on the basis of my conversations with him, I would say he would intend to ask for the right to put questions to witnesses, which questions I didn't feel proper for any reason.
>
> MR. LEZAK: Your Honor, I think there was one more thing he stated that he wanted. He wanted the right to disassociate himself from any statement made by counsel with which he disagrees.
>
> THE COURT: In other words, if his attorney does something he wants the right not to be bound by that, is that correct also Mr. Epstein?
>
> MR. EPSTEIN: I'm not sure if that is correct - - exactly correct. He said he wouldn't be bound by anything I represented in Court or agreed to in Court unless he was present. (Tr. Aug. 22, 23-4).

The defendant on the next day said to the Court in response to a question as to his dissatisfaction with Mr. Epstein:

> THE DEFENDANT: No, sir, I'm not dissatisfied; nor shall I be bound by anything he says or does. . . (Tr. August 23, 28)

This is the background for the Court's ruling that defendant could not have it both ways at the time of the preliminary hearing. The Court's ruling was in keeping with the rule of this Circuit in Duke v. U.S., 255 F.2d 721 (1958) cert. den. 357 U.S. 920.

In that case, the defendant was a lawyer who desired to associate another attorney to participate in his representation. The trial Court ruled that the other attorney was to have full control of the case. The Court approved the trial Court's statement to defendant that:

> "the obligation of Duke was to appear in propria persona or be represented by counsel, but that he did not have a right to a hybrid of the two." 255 F.2d 721, 725.

Notwithstanding Judge Solomon's ruling, defendant was permitted by Judge Kilkenny to participate actively in his trial. He gave part of the opening statement and argument and interrogated witnesses. Again defendant has failed to show how he was prejudiced in any way by the Court's ruling in view of the full disclosure of the evidence made by the prosecution in this case.

ANSWER TO POINT XIV

In the opinion granting the order denying a new trial the Court said: (R. 244).

> "Finally, defendant contends that the Court erred in failing to require the Government to name the confidential informant who supplied the information in support of the affidavit of John E. Wells to search the premises at 2706 S.E. Ash Street in Portland. Previously, the Court viewed in camera the F.B.I. report in connection with this confidential informant. I was then of the belief that the name should not be disclosed and found, and now find, that the informant had absolutely no connection with the alleged counterfeiting operation. I will now seal a copy of the report and deliver it to the clerk for transmittal to the Court of Appeals, in the event of an appeal in this cause. On these facts the defendant is not entitled to this information." McCray v. Illinois 386 U.S. 300 (1967); Powell v. U.S. 374 F.2d 386, (9th Cir. 1967).

Defendant's unsupported request for the name of the confidential informant who supplied information in support of the affidavit of John E. Wells to search the premises at 2706 S.E. Ash Street in Portland was properly denied. (See Government's letter of April 3, 1967 to the Court along with an F.B.I. report containing the name of the informant.)

Initially, it should be noted that the above address was not that of the defendant Lee Edwin Allen Parker but rather that of Charles Slaney, a Government witness. Moreover, the search of the Slaney residence took place after that conducted at Parker's home, and so far as the warrants and affidavits disclose, the two were unrelated. It is therefore questionable whether defendant has the requisite standing to even have made such a request. However, even assuming arguendo he had such standing, he was

nonetheless not entitled to the information sought.

The recent case of McCray v. Illinois, 386 U.S. 300 (1967), 35 L.W. 4261, is dispositive of this question. In McCray, petitioner was arrested by Chicago police officers pursuant to information supplied by an informant who had proven reliable on numerous occasions in the past. The information supplied stated the petitioner "was selling narcotics and had narcotics on his person and that he could be found in the vicinity of 47th and Calumet at this particular time." The officers then drove to this vicinity where the informant identified the petitioner and then departed. The arrest and the subsequent discovery of narcotics followed.

Petitioner filed a motion to suppress, at which time he requested the identity of the informant. The request was refused. In affirming, the United States Supreme Court found the detailed testimony of the arresting officers at the hearing respecting the circumstances of the arrest and the facts upon which it was based fully justified a finding of probable cause for the arrest and search.

With respect to the question of the informant's identity, the Court cited with approval Wigmore's Treatise on Evidence describing the testimonial privilege as

> "A genuine privilege, on . . . fundamental principle. . . must be recognized for the identity of persons supplying the government with information concerning the commission of crimes. Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity--to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him. The government

> also has an interest in non-disclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.
>
> "'That the government has this privilege is well established, and its soundness cannot be questioned.' (Footnotes omitted.) 8 Wigmore, Evidence § 2374 (McNaughton rev. 1961)."

The Court then distinguished Roviaro v. U.S., 353 U.S. 53 (1957), reversing the defendant's conviction for violation of the Federal narcotics laws, for failure of the Government to supply the name of the confidential informant. The Court noted the informant in Roviaro had been an active participant in the crime, personally playing a significant role in the defendant's procurement of the narcotics which were the subject of the indictment.

As in McCray, the record in the case at bar is devoid of even the slightest scintilla of evidence indicating the informant's participation in the case, either active or passive. His only role was to supply information based on which the warrant for the search of Slaney's residence was issued. With respect to an informant acting in such a capacity, the Court stated:

> "Indeed, we have repeatedly made clear that federal officers need not disclose an informer's identity in applying for an arrest or search warrant."

To the same effect, see U.S. v. Rugendorf, 316 F.2d 589 (7th Cir., 1963), affirmed 376 U.S. 528 (1963), where a search warrant was issued based in part on information supplied from a reliable informant who had been in the defendant's residence and observed certain fur garments

described by the defendant as stolen. See also: Miller v. U.S., 273 F.2d 279 (5th Cir., 1959); Garcia v. U.S., 373 F.2d 806, 808 (10th Cir., 1967); and the recent Ninth Circuit opinion in Powell v. U.S., 374 F.2d 386 (1967). In Powell, defendant alleged the Court erred in rejecting his motion to disclose the identity of the Government's informant. The Court summarily disposed of this point with the trenchant statement that "there is no basis whatever" for such a contention. The Court then set forth the following rule, as well as the policy behind the so-called "informer's privilege":

> "'It is established that the Government is not required to reveal to an accused the identity of one who furnishes 'information of violations of law to officers charged with enforcement of that law'', (citing Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.ED.2d 639, which in turn cites Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L Ed. 151.
>
> "A rule that any person who merely informs the officers of the commission of a crime must be disclosed to the accused as the one responsible for his arrest would serve to encourage the criminal to wreak his vengeance on the informer. Such information might be hard to come by; and such a rule would seriously hamper accepted police investigative techniques.
>
> "If there was an informer in this case, there is nothing to show that he was more than a mere observer, not a participant. * * * It would be unthinkable to call for a reversal here in the complete absence of facts to support appellant's claim."

CONCLUSION

It is submitted that this Court should affirm the Judgment of the Court below finding defendant guilty on all three counts of the indictment.

Respectfully submitted,

SIDNEY I. LEZAK
United States Attorney
District of Oregon

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that I have made service of the foregoing Brief for the Appellee on the Appellant, Lee Edwin Allen Parker, by depositing in the United States Post Office at Portland, Oregon, on December 17, 1968, a certified true, exact and full copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to Charles E. Springer, Esq., 333 Flint Street, Reno, Nevada, 89505, attorney of record for Appellant.

SIDNEY I. LEZAK
United States Attorney
District of Oregon
Of Attorneys for the Appellee